

**MINUTES
HAMPTON ZONING BOARD OF ADJUSTMENT
THURSDAY, FEBRUARY 17, 2005**

MEMBERS PRESENT: Michael Kennedy, Chairman
Matt Shaw, Vice Chairman
William O'Brien, Alternate
Rick Griffin
Jennifer Truesdale, Clerk

OTHERS PRESENT: Kevin Schultz, Building Inspector
Angela Boucher, Recording Secretary

The Chairman called the meeting to order at 7:04 p.m. and introduced the members of the Board and the Pledge of Allegiance was achieved.

01-05 The petition of Condo View Realty Trust, Carolyn N. Rioux, Trustee, for property located at 30 Towle Farm Road seeking relief from Article 4 (as to Section 4.1.1) and Article 8 (as to Sections 8.2.3, 8.2.4 and 8.2.6) to construct a 14-unit residential condominium with 7 two-family structures, where the project will not meet the minimum area per dwelling unit, the open space buffers for boundaries, or the minimum spacing requirements for structures, parking and driveways. This property is located at Map 123, Lot 3 in a G Zone.

Attorney Steve Ells and Peter Ross of Ross Family Trust came to the table to speak on the petition.

Mr. Ells explained that this petition proposes a 14 unit residential condominium project consisting of 7 2-unit structures. The occupancy will be limited to 55 and older. He noted the typical elevation plan is shown on the easel. He feels this proposed structure design will fit nicely into the neighborhood. Last August, when they first appeared, they were asking for 16 units or 8 duplexes. At that time, they clearly heard that they were asking for a little too much, he said. The Board also heard from abutters from Hampton Towne Estates, across the street, and Drakes Landing, who surrounds the property, that they were concerned with the density.

He went on to explain that they looked at this "General" Zone and considered the allowed uses and played with the commercial condo possibility. We could do virtually the exact same footprint that was previously proposed legally in this zone with commercial condos, he said. We had our engineer prepare plans and we met with the abutters. They are not at all interested in seeing anything except residential use here. Unfortunately we need 100% consent of the membership before we could do anything. We got close to that but couldn't get 100%.

So now we've eliminated 2 units and reduced the density. Compared to Hampton Towne Estates, they have 4780 s.f. of land per unit, we'll have 5582 with this proposal. He distributed a tax map of the entire area for the Board to see. We also looked at the possibility of 1 or 2 large structures, he said. We dismissed that concept because we feel the area and market are looking for low, small scale structures.

Mr. Ells then read through the 5 criteria as presented with his petition. We could build a commercial structure without a single variance, but that's not our preference and not the abutter's preference. The only other way would be to build 1 or 2 large structures. This is consistent with the spirit of the ordinance and the neighborhood. Similar projects have done very well. He also spoke of the good feeling he got when working with the abutters at Drakes Landing and Riverwalk. He would recommend that for any petitioner when it may help matters. As part of the talks it was always apparent that they were concerned with their members in the larger structures up near the road (Riverwalk). We would offer to replace the stockade fence between the Condo View property and the Riverwalk buildings. We also offer to plant a series of evergreen trees on their side of the fence. There is an existing tree line on the Condo View side of the fence. Or we could keep the existing and supplement the trees on our side of the fence.

He noted that in the file there should be a letter from The Commons Property Management, Managing Agents for Hampton Towne Estates. They note in the letter that they would prefer a residential condo rather than a commercial condo use at this property.

Questions from the Board:

Mr. Shaw asked what the bumpouts were along the back of the buildings? Mr. Ells responded decks.

The Chairman noted that there are 2 letters in the file where the authors have asked them to be read. Clerk Truesdale read them aloud. 2 of the same petition form letter from the 16 residents of Riverwalk asking the Board to deny the petition due to potential water problems, traffic, density and affect of market value. And another from Barbara Rindfleisch, who also signed the previous letter, concerned with water displacement and her basement which now has a sump pump, opposing any variances.

Comments from the Audience:

Christine Collins, Riverwalk and Drakes Landing Condo member representing units 1 through 15, said they are against overdeveloping of the land. They were familiar with the Town requirements when they purchased the property. They have twenty feet between buildings where 40 feet is required. And they have buildings 7.3 feet from the property line near Riverwalk. They're asking for 5582 s.f. of land per dwelling unit where 15,000 is required. 2.3 feet where 40 feet is required. They have enough land to build 5 units utilizing 2 buildings. She also spoke of the traffic and the blind corner coming over 101.

Gene Fournier, Board of Directors, Riverwalk Condo Assn., said he met with Steve back in August last year. There were 8 units at that time. He has a backup plan of industrial property. We surround them on 3 sides, he said. They approached us to purchase the land we own between them and Rt. 101. This was greatly received by the Association members at the meeting. We followed up with a letter to the 53 members and we had 4 negative responses. We were able to make everybody happy except for 1. He's surprised to hear so many people signed the letter that was submitted.

Mr. Schultz confirmed 14 (plus 2 on another sheet, making 16).

Mr. O'Brien asked if Mr. Fournier is speaking for the Board.

Mr. Fournier went on that there are minutes of the Board of Directors meeting on 1/4/05. The Board will not oppose the plan submitted on Jan. 20th, which is now Feb. 17th.

Mr. John Leary, 25 Riverwalk, said he was also stunned when he heard there were 14 signatures.

Mr. Kennedy advised that they appear to represent units 1-16, except for 15.

Mr. Leary went on, as past president of the Association, and as one who was privy to what went on, he is in agreement with Mr. Fournier. He said he spent 37 years negotiating and administrating labor contracts. An important part of any negotiation is a willingness to compromise. As a private member of the Association he and his wife support the petition.

Back to the Board.

Mr. Ells distributed photos of the tree line and fence along the Riverwalk Condos. We propose to leave the tree line and put in more trees on their side of the fence. We could instead supplement the trees on our side, he said. The trees pretty much hug the fence. Our intention is to leave as much a tree line as possible. The current character of the neighborhood is an element to consider when evaluating a petition.

Mr. Kennedy asked if the garages were 2 car? Mr. Ells responded yes. Mr. Kennedy went on that there was also an additional space for each unit, making 3 spaces per. Mr. Ells agreed.

Mr. Griffin asked if the residences will be on slabs? Mr. Ross responded, no, full cellars.

Mr. Shaw was concerned with a turning radius and unit 1 being so close to the street.

Mr. Ells responded that that will be a Planning Board Matter. They have contracted curbside pickup for trash. There is a little room to move the buildings around. We do have the recreation area, he said. And as for the drainage, that will also be taken care of at the Planning Board.

Mr. O'Brien asked the width of the road and if the buildings could be moved in a little bit from the easterly line.

Mr. Ells responded that they looked at it with their engineers and he doesn't think there's room to move them in because of the turning radius. We could however push everything to the west because there's no abutters over there and 1.7 acres of wetland and the highway. We didn't ask for that, he said.

Mr. Kennedy clarified that the decks will be 7.3 feet from the property line and it is not shown correctly on the plan.

Mr. Ross said he will have it corrected. The setback will be 7.3 feet to the 8 foot deck.

Mr. Shaw feels this plan fits the neighborhood.

Ms. Truesdale agrees, but they want to be even closer (to the property line).

Mr. Shaw commented that across the street they are close.

Mr. Shaw MOVED TO GRANT THE PETITION, SECONDED by Mr. O'Brien.

The Chairman polled the Board on their satisfaction that the 5 criteria required for granting a variance are being met, with Ms. Truesdale disagreeing with hardship with the setback and Mr. Kennedy questions hardship because they could build 1 large building in the middle. The others agreed.

Mr. Ells commented that the neighborhood doesn't want 1 large building and market data shows that 55+ buyers would prefer the smaller buildings.

VOTE: FOR 3, OPPO 2(MK,JT)

PETITION GRANTED.

A 5 minute break was taken at this time. Mr. Griffin leaves the Board.

02-05 Appeal of Myrtle Woodward and Barbara Burbank from Administrative Decision for property located at 292 Winnacunnet Road regarding the status of an addition to a garage as a second dwelling unit. This property is located at Map 206, Lot 33 in a RA Zone.

Attorney Craig Salomon and Barbara Burbank came to the table to speak on this appeal.

Mr. Kennedy said he's read and spoken to many people about this appeal. He asks the people here this evening to speak on the facts of the case only. In this case we're acting as a Board of Appeals regarding Kevin Schultz' decision in interpreting section 1.6 of the ordinance as it relates to Mrs. Burbank's property.

Atty. Craig Salomon asked if Mrs. Myrtle Woodward could speak first so that she can go home, as she is 96 years old. The Chairman agreed.

Mrs. Burbank and Mrs. Woodward came to the podium. Mrs. Burbank read from a letter authored by Mrs. Woodward. She said that there are 3 generations of women living at the property. There is a suit against her from the Town that will deplete her life savings if she loses. She asked that the Board please tell her what is against code in the addition, and she will make sure it is removed.

Mr. Salomon went on recognizing that there are 4 members on the Board and he has consulted with his clients and they will proceed. He explained that also here this evening is Mrs. Burbank's daughter, Kim Schnalenberger, Paul Cole, the contractor and David Leonard who filed the original complaint with the Building Inspector. Mr. Salomon said he concurs with the Chairman's explanation of why we're here. He explained the background that Mrs. Woodward sought a variance in 2002 to do work over the garage. When that was turned down they sought and received a building permit for an addition to the garage. He submitted a letter to the building department in 2002 stating that the Woodwards would use the addition in conformance with the Hampton Zoning Ordinance. The use would be incidental to the primary residence. In February of 2003 the

Building Department signed off on the addition and said if a kitchen were built it would be a violation of zoning. The inspector's log says that there is no plumbing to the kitchen area. That's where we were when the occupancy permit was issued for this property. In December 2003, his client requested an inspection for a sink she wanted to put in the addition and never received one. In November 2004, when Mr. Schultz went into the residence, there was no sink installed. On November 18th, 2004, Mr. Schultz had contact from David Leonard and a letter was drafted regarding the violations. Mr. Salomon explained the wording of the letter and accused that Mr. Schultz had to have helped him write the letter because a laymen would not have used some of the jargon. As a result, Mr. Schultz posted both the addition and the area over garage are not to be occupied. There's a court order that we can't use the area over the garage and we've agreed to that.

Mr. Salomon read the definition of a dwelling unit to have permanent facilities for living, cooking, sanitation, sleeping and eating. He presented photos from Allied Inspection showing that there is no plumbing and no drain to the sink and no gas line to the stove top. The counter is not permanently attached, he said. There is no closet in the upstairs room. He explained pictures of the crawl space showing no plumbing down there to the kitchen. It's not even rough plumbed, he said. He also noted a letter in his submitted packet from Jackson Simpson, Real Estate Agent, stating he could not list this property as a dwelling unit. There's no kitchen, no closet in the bedroom, and no plumbing to the laundry room.

He went on to say that ordinance 1.6 definition says that a dwelling unit has complete independent living facility. This kitchen isn't plumbed, the stovetop isn't hooked up, and the water, heat and sewer all come from the main house. They have an electric oven, microwave and refrigerator. These are all items any of us could have in a rec room. He said, my clients have been aware before that they cannot create a 2nd dwelling unit without approval from the Town. But, he admits they have come close. This area is handicap accessible where the main house isn't. The family uses the downstairs for gatherings.

Mr. Cole, the general contractor, said nothing has changed since the occupancy permit except for the addition of the furniture

Mr. Salomon went on to say that they had not been using the area over the garage for anything but storage. Staying focused on the addition, he said the question is 'is it complete and permanent?' Is it unsafe to occupy this area? There are no facts to support his determination. The only link is the area over the garage. The question is whether there is a firewall between the garage and the room above. There's no heat or electric over the garage. While this appeal is in process, you have to find there is a real imminent, immediate threat. Mr. Schultz is putting people out on the street, he said. Mrs. Burbank's daughter's bedroom is there and that's where they dine. Mr. Schultz' letter says we violated section 3.3 of the zoning ordinance. Because of that the property is posted as unsafe for human occupancy. Whether or not a zoning violation occurred has nothing to do with safety, he said.

Questions from the Board:

Mr. Kennedy asked if Mrs. Burbank's daughter eats and sleeps in the addition but also eats and does laundry in the main house. He also asked about the double oven mounted in the cabinet.

Mr. Salomon said they are electric, not permanent.

Mrs. Burbank said they slide in and out, not permanent.

Mr. O'Brien asked about the cut into the area over the garage.

Mr. Salomon said that door was a part of the original building permit. It's a fire rated door.

Mrs. Burbank said the countertop and stovetop have been there 2-3 years.

Mr. Kennedy was concerned that any new electrical work compromised the firewall between the addition and the garage.

Mr. Cole said he did the architectural design. He did not do any of the electrical or plumbing. He believes the lights over the garage go down through the main part of the garage to a switch.

Building Inspector Kevin Schultz and his attorney Jim Merrill came to the table to speak on Mr. Schultz' decision. They submitted a packet with pictures and their chronological explanation of events. Mr. Merrill said the primary residence has 10 rooms, 4 bedroom, 2 ½ baths. The detached garage and addition are permitted. In 2002 they sought a variance to add living area over the garage and were denied. The owners then, in August 2002, applied for, and received, a permit for a recreation room and a loft, with a bathroom, attached to the garage. After the project was completed, their attorney Craig Salomon submitted a letter stating that they will use the addition in conformity with the terms of the Hampton Zoning Ordinance. In November 2002 Mr. Schultz visited the addition and immediately noticed how the petitioners deviated from their approval under the building permit. He noticed the loft area was closed in and had closet storage. In February 2003, he noticed on the first floor there was a living area separated with a wall that could be a kitchen area and it was electrically wired as if for a kitchen, but with no visible plumbing. When pointed out to Ms. Burbank's daughter she said it was going to be an office with stools, not chair height. He reminded them to obey the ordinance. When performing his final inspection he noted that the first room as you enter the addition could easily accommodate a complete kitchen. Then an application was filed listing Bob Sperry as the plumber to install a sink. The building department contacted Bob Sperry and he had not been consulted about the application. Then Mr. Schultz received a complaint from Mr. Leonard. He raised issues that Mr. Schultz was concerned about. Mr. Schultz then received an inspection warrant granted by the Hampton District Court. Mr. Schultz spent approximately ½ hour at the property making his inspection and taking photographs. Attorney Merrill went on to say the definition of a dwelling unit in the ordinance does not say that they have to be complete. There is a kitchen area with cabinets installed, a coffee maker, countertop, dishwasher, double wall oven, refrigerator, sink, microwave oven, stovetop, toaster oven, knives, utensils, paper towels, spices, blender, crock pot etc. They can cook in there whether or not the stove is hooked up. There's a dining area, rec room and loft with couches, wall hangings, a full bathroom, which is fully operational, a bedroom with clothes, bed, dresser, no closet, but a place to store clothes. Can you completely and independently live here, yes. The intention and use is a fairly substantial living area.

Mr. Merrill went on; the Town has a right to zone. This zone is restricted to single family residences. Each of the elements under the definition of a dwelling unit are here. The fact that the sink is not plumbed doesn't stop sanitary facilities. This addition has sanitation facilities, cooking facilities, eating facilities and sleeping facilities. He referenced a court case of Sullivan v. Investment Trust Co. regarding the ability to remodel to multi-family when a property is in a single family zone. Mr. Schultz' decision is reasonable and appropriate. He's been working for the Town for 5 years and has worked hard at it. He's an honest and truly genuine person who cares about his job and the Town. He takes the facts and applies the law. This is a reasonable decision.

Questions from the Board:

Mr. Shaw asked what's left of the open loft concept. Mr. Schultz answered just the window area. That's how it was when it was built.

Mr. Kennedy asked what was in the kitchen area when the permit was closed.

Mr. Schultz responded nothing, except for walls and outlets at countertop height. He questioned the intent because of the way the area was laid out. Their answer was a high counter top will be installed for computers. This doesn't violate anything so it was therefore allowed.

Discussion followed on the layout of the areas and the safety concerns with the possible compromise of the firewall. Mr. Schultz had taken pictures of new receptacles installed without permits, water lines and drains were run to the refrigerator. He didn't inspect the electric panel and didn't know if there were any new breakers labeled for over the garage. Because of the extensive work that was done there, he is concerned with life safety. He has no idea what's been done without permits or inspections. His decision was made on the side of safety. There's a fire rated wall and door that separates the addition from the garage. He doesn't know if that has been compromised. The addition violates zoning. The area over the garage that has been worked on without permits, he doesn't know if things have been done to code. If he was right and he saved someone from getting hurt, then he's done his job, he said. He received a complaint from Mr. Leonard that all appliances are in and there are just few more to hook up. And that there's a child staying in the area over the garage every other weekend. He told him he needed a written complaint. He (Mr. Leonard) came to the office and filled out the form. Those are his words, not mine, he said. His main concern was not the zoning so much as the safety of someone staying over the garage. Apparently he has submitted another document saying "what did I know?" Well he did a good job, Mr. Schultz said.

Mr. O'Brien asked if he needed a court order.

Mr. Schultz said that's how he proceeded, feeling that he wouldn't be invited in.

Mr. Kennedy asked if there were any electrical branch boxes. Mr. Schultz didn't think so. He said he spent 29 minutes in there documenting and taking pictures and left.

At this time the Chairman told the audience that no further petitions would be heard this evening. The meeting will be continued the following Thursday, February 24th, at 7:00 p.m.

A 10 minute break was taken at 9:30 p.m. Back to order at 9:40 p.m.

Comments from the Audience:

John Cochran, 284 Winnacunnet Road, direct abutter, is concerned because he assumed the property had an in-law apartment. He didn't have an issue with that. He asked if there were any direct concerns with this structure and his property.

The Chairman answered he couldn't answer that. The Board's concern is whether it's a dwelling unit or a rec room. Whether there's a difference to you we don't know. The setbacks did not require a variance. Mr. Cochran said he's concerned with any possible impact on his property.

Dave Menson, of Dover, NH, questioned the clarity of the definition of a dwelling unit in the Hampton Zoning Ordinance.

Ms. Burbank said she has the original permit dated December 2003 to install a sink. She hadn't hired a plumber yet because she assumed she needed a permit first. The secretary at the office looked up his address and his license number for her. Bob Sperry came to her and said Kevin needed to inspect the area. She said o.k. but they never came. As far as the rec room is concerned, we use it to eat. We gather there because it is handicapped accessible. The first floor in the main house has a half bath that is not handicap accessible. Who says a bed can't be recreational. We watch football and eat and drink and carry our dirty dishes back to the main house to wash, she said. My storage area (over the garage) is very private. I have promised 2 granddaughters that they would have bedrooms. The carriages are for dolls. My aunt has asked that you tell us what you want us to remove? she asked.

Mr. O'Brien asked who performed the electrical work over the garage.

Mrs. Burank said the lights were there. She did have additional wires installed but they are dead ended.

Mr. Schultz explained that an owner can do some electrical work in their own abode.

Walter Brown, Hampton resident, said he's a friend of the family. The light in the hallway was there. He is a QC inspector for the Portsmouth Navy Yard. The wires above the garage go nowhere. He did, however, change a light fixture in the hall. The new outlets are dead ended at the new box. They are not hooked in.

Mr. Kennedy asked if he ran the wires through the firewall. He agreed.

Paul Cole, NE System Built Homes, said he designed and built a fully functioning rec room that could possibly be a home some day; but it couldn't be a separate dwelling unit because the sewer is not separate. It was not conducive to run the electrical from the main house. It comes through the garage. An electrical contractor installed the plugs and lights in the garage. The upstairs' wiring comes from the original house. It's not typical of today's work or last 25 years. The firewall is intact as originally intended. The upstairs portion was designed with an access door to the area over the garage. None of that has changed. As far as the kitchen, only the original plumbing and sewer supply is there. There seems to be concerns about the room over the garage. He sees the sign that says "structure unsafe". He takes offense to that.

Mr. Kennedy asked him if he inspected the property after the additional wiring was done. He said no.

Mr. Kennedy explained that two family homes quite often have 1 water pipe and 1 sewer line.

James Workman, of 470 Winnacunnet Road, and also a member of the Hampton Board of Selectmen, said he's lived in his house for 10 years and his wife was there 8 years before that. Nothing in the house is permanent. He could take a saw and bring his sink in and could unplug his stove. He supports Mr. Schultz. He said he has acted on a complaint. He's a preeminent professional. He's worked for the town for 5 years and he's heard nothing but good. His department is fair, balanced and reasonable. His Dad knew electric, he said. Electric is not a hobby. Leave it to the professionals. He asked the Board to uphold Mr. Schultz' decision.

Ms. Burbank said that Jackson Simpson gave an opinion that there is no laundry room. It's not hooked to anything.

Atty. Salomon said this appeal is not about Kevin. It's about a close call. The use is the issue. If you reveal the material submitted, fixtures involve pipes to the sink and lines to the drain. Fixtures are permanent. The fireplace, television, dining room table, collectibles are all recreational. What we have is 3 generations and sometimes 4 living at 292 Winnacunnet Road. People sleep in lofts all the time. If there's no kitchen, it's not a dwelling unit. The house is 3 bedrooms and den. As long as she doesn't go over the line, she meets zoning. But she can go as close to that as she can. The Town in the case used by Atty. Merrill doesn't have the definition of a dwelling unit that Hampton has: permanent and complete.

Mr. Salomon went on to say the new wiring is not live. The only electric in the area over the garage is that which existed when they bought the property. Health and safety comes down to 2 things. Are we conforming with the agreement and court order and is the wiring dead.

Atty. Merrill argued that we need to determine at what point is there permanent fixtures. The intent and actual use is going on. A sink is not required to make this a dwelling unit. There's a double wall oven, cabinets installed, permanent bedroom space. The use is ongoing and clearly intended as a second dwelling unit. The daughter is living in the dwelling unit. Does it provide permanent provision for cooking and eating, yes. We ask that you uphold Mr. Schultz' decision. We just don't know what's gone on out there. We don't know if the firewall has been compromised. We would've known if they came to Kevin and received proper permits and inspections.

Hearing no further comments from the audience, the Chairman called the public portion of the petition closed.

Discussion of the Board:

The Board discussed the definition of a dwelling unit and the fact that someone came and filed a complaint and Kevin had to act on that complaint. He believes it is a dwelling unit.

Mr. Shaw MOVED TO UPHOLD Mr. Schultz' interpretation and determination that this rec room/loft addition to the garage is a second dwelling unit on the property. SECONDED by Mr. O'Brien.

VOTE: 4 FOR UNANIMOUS

MOTION PASSES.

The Board discussed the safety issue of the rec room/loft addition and Mr. Schultz' "Stay of Enforcement". Has the firewall integrity been breached?

The Board discussed the opportunity for someone to review the integrity of the firewall. The ZBA Attorney Peter Loughlin came forward to give them advice. The Board discussed that Mr. Schultz inspect the firewall and leave his order in effect pending his findings.

Ms. Truesdale MOVED to table a decision on the "Stay of Enforcement" pending an inspection by the Building Department and a report back to this Board on next Thursday. At which time we will only hear from the Building Inspector. No public comment. SECONDED by Mr. O'Brien

VOTE: 3 FOR – 0 – 1 ABST(MS)

MOTION PASSES.

Ms. Truesdale MOVED, SECONDED by Mr. Shaw to adjourn to a Business Meeting at 11:07 p.m.

VOTE: 4 FOR UNANIMOUS

MOTION PASSES

BUSINESS MEETING:

Mr. Schultz told the Board that Atty. Peter Saari would like a session with the Board regarding 707 Ocean Boulevard. Additionally, Mr. Saari would like to extend a variance on 488 High Street; however, it is past the two year expiration date. The Board agreed that this is not possible and wouldn't be legal. He also distributed a memo from John Harwood, Town Planner, and one from himself regarding "road frontage" in response to Mrs. Woodward's second Administrative Appeal petition #08-05.

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The meeting was adjourned at 11:30 p.m.

Respectfully submitted,

Angela Boucher,
Recording Secretary